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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

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SUPREME COURT, U.S.

TICOR TITLE INSURANCE COMPANY, *et al.*
Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO DEFER BRIEFING AND ARGUMENT

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Respondents request leave to file this reply in support of their motion to defer briefing and argument by facsimile in view of the fact that service of the Petitioners' opposition was not received until yesterday, October 27, 1993.

Petitioners' opposition to the motion of Respondents to defer briefing in this case is hypocritical. On the one hand, Petitioners acknowledge their obligation under the Memorandum of Understanding dated October 1, 1993, entered into before this Court granted certiorari, to "endeavor in good faith to achieve the consummation of the settlement described herein. . . ." On the other hand, they ask the Court to proceed with the petition, recognizing on page 1 of their opposition brief that this would likely result in a ruling by this Court before settlement proceedings could be completed. The inherent conflict between Petitioners' obligation, reiterated in their opposition, to diligently pursue the settlement process and their stated desire, now that the Court has granted certiorari, to obtain a ruling in this Court before settlement proceedings can be completed, is obvious.[1] Presumably, if this Court rules in favor of Petitioners, Petitioners will take the position that the settlement agreement is no longer binding. Will Petitioners, if they fail, seek to bind Respondents to the settlement agreement?

[1] An example of this conflict has already occurred. Only days after filing their opposition brief containing representations that they would proceed expeditiously with settlement proceedings in the District Court, one of Petitioners' counsel advised counsel for Respondents that in his view the District Court likely lacked jurisdiction to consider the settlement because the Ninth Circuit stayed a return of the mandate pending review in this Court.

It was to avoid such a circumstance that the parties jointly petitioned this Court to defer any action with respect to the petition for certiorari pending the completion of the proceedings required by Rule 23 with respect to their settlement.

The joint request for deferral of proceedings was an integral part of the bargained-for consideration in the settlement. In the weeks leading up to the parties' Memorandum of Understanding (attached to Respondents' motion as Exhibit B), the pendency of the petition and the risk that, if granted, there would be additional delay in payments to the class as well as the inherent uncertainty involved in having a previously-decided issue reexamined, figured in the parties' negotiations. The Respondents agreed to take less in settlement than they might otherwise have demanded in order to eliminate the factors of uncertainty and delay. Petitioners, on the other hand, agreed to forego the opportunity of review in this Court in order to avoid a larger demand and the cost of further proceedings. This resulted in the parties' joint October 1, 1993 letter in which the Court was requested to "defer any action with respect to the petition for certiorari . . . to allow the lower court to consider [their] settlement." As the parties' joint submission states, "[t]he reason for our request is that the settlement reached by the parties is intended to moot the petition." (See Exhibit A to Respondents' motion) (emphasis supplied).

Petitioners' citation of Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 n. 3 (1978) on the issue of mootness is misdirected.

Petitioners' quotation from the cited footnote omits the reference to the disposition in the companion case where "[r]espondents and petitioners . . . agreed to dismiss that petition. . . ." While the parties in this case did not agree to "dismiss" the petition, they did agree to "defer" the petition.

In these circumstances, the situation before the Court in this case is apparently the same as that in Hanson v. East Lincoln Township, where, as described in Petitioners' opposition to this motion, "the parties jointly asked for deferral of proceedings, presumably reflecting a shared assessment of the likelihood of ultimate mootness. . ." (emphasis in original). While Petitioners now seek to dwell on possible impediments to the satisfactory culmination of the settlement, the joint request for deferral of proceedings that was submitted here necessarily reflected the same "shared assessment" of likely ultimate mootness that Petitioners attribute to the comparable joint request in Hanson.

In light of the parties' joint request for deferral, the only proper course is to grant the motion of Respondents.

RESPECTFULLY SUBMITTED this 28 day of October, 1993.

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The undersigned hereby certifies that s/he is a member of the Bar of this Court and that all parties hereto have been served with a copy of the foregoing RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO DEFER BRIEFING AND ARGUMENT by facsimile and mail this 28th day of October, 1993, addressed as follows:

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